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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1043

PAUL BARSALOUX,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No.

PAUL BARSALOUX,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Paul Barsaloux, respectfully prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Fifth Circuit.

JUDGMENT AND OPINION OF THE COURT BELOW.

On December 8, 1969, the Court of Appeals for the Fifth Circuit affirmed petitioner's conviction, Cause No. 28090, a copy of the opinion in said cause is attached as Appendix A, it having not been reported.

JURISDICTIONAL STATEMENT.

Petitioner was convicted of violation of Title 21, Section 176(a) and Title 26, Section 4744(a)(2), United States Code, and appealed his conviction. His conviction was affirmed. The jurisdiction of this court is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

1. Does the concept of "border search" permit a warrantless search and seizure upon suspicion only, some 20 hours after defendant has been thoroughly searched at the border, no contraband found and defendant permitted to proceed on his way?

2. Is a "second search" 20 hours after an unfruitful search of a citizen at the border, a "border search", merely because it is conducted by a customs agent?

3. Does the Fourth Amendment of the Constitution prohibit indiscriminate searches by customs agents after the citizen has been thoroughly searched at the border and no contraband found?

4. Are seizures by customs agents, not incident to border crossing, subject to the warrant requirement of the Fourth Amendment of the Constitution?

5. Can a defendant tried prior to the court opinion in *Leary* v. *United States,* 395 U.S. 6, 23 L. Ed. 2d 57, raise the invalidity of his conviction based on Title 26, Section 4744(a) (2) and the presumptive features of Title 21, Section 176(a)?

6. Does the provision of Title 21, Section 176(a), requiring a person to invoice with the government any marijuana violate the self incrimination provisions of the United States Constitution?

STATUTES INVOLVED.

Title 26, Section 4744(a)(2) and Title 21, Section 176(a), are set out in Appendix B.

STATEMENT OF THE CASE.

Michael V. Harvey, a United States Customs Agent, testified that he received a tip from a reliable informant that certain individuals would be coming from Illinois for the purpose of obtaining marijuana in Mexico and shipping same back to Chicago, Illinois. He did not state (1) where the informant had received the information or (2) why the informant was reliable (T. 5-6). From August 23, 1968 until August 28, 1968, the officer observed defendant's going to and returning from Mexico. He testified that defendant

was observed visiting the person "known" to be involved with the smuggling of marijuana into the United States (T. 8-14). He never saw defendant receive any marijuana or any other item suspected to be marijuana. Defendant left Mexico for the last time approximately 11:00 p.m. on August 28, 1969 (T. 22). Defendant's car was thoroughly searched. No contraband was found (A. 22). Some 20 hours later, a suitcase deposited by defendant for shipment with Trans Texas, a shipping company, was seized (T. 27-29). The suitcase contained marijuana. Defendant at a different location was subsequently arrested.

Defendant was indicted in a three count indictment.

Count I reads:

> That on or about August 28, 1968 in the Laredo Division of the Southern District of Texas, and within the jurisdiction of this Court, one Paul Barsaloux, did unlawfully, knowingly, and willfully, with intent to defraud the United States smuggle and clandestinely introduce into the United States, a quantity of Marihuana which should have been invoiced, to wit: approximately Ten (10) pounds of Marihuana (Cannabis Sativa), without having such Marihuana invoiced, contrary to and in violation of Section 176(a), Title 21, United States Code.

Count II reads:

> That on or about August 28, 1968, in the Laredo Division of the Southern District of Texas, and within the jurisdiction of this Court, one Paul Barsaloux, hereinafter called defendant(s), with intent to defraud the United States, did unlawfully, and knowingly transport and facilitate the transportation and concealment of approximately Ten (10) pounds of Marihuana (Can-

nabis Sativa), more or less, after importation; and the defendant(s) then and there knew the said Marihuana to have been imported into the United States contrary to law. (Violation: 21 U.S.C. 176(a).)

Count III reads:

> That on or about August 28, 1968, in the Laredo Division of the Southern District of Texas, and within the Jurisdiction of this Court, one Paul Barsaloux, transferee(s), required to pay the transfer tax imposed by the Internal Revenue Code, did unlawfully and knowingly transport, conceal and facilitate the transportation and concealment of a quantity of marihuana, to wit: ten (10) pounds of Marihuana, (Cannabis Sativa) without having paid the transfer tax imposed by said code. (Violation: 26 U.S.C. 4744(a)(2).)

Petitioner moved to suppress the items seized. The trial court justified the seizure upon the theory of a border search and upon the theory that the seizure was incidental to the arrest the officer could have, but did not make. The Court of Appeals upheld the seizure only upon the theory that it qualified as a "border search."

The evidence at the hearing on the motion to suppress was stipulated as being the evidence at trial. It was also stipulated that the suitcase contained marijuana. Defendant was found guilty on all counts and sentenced to 6 years on each count.

Defendant's trial occurred in April, 1969, prior to this court's decision in *Leary* v. *United States,* 395 U.S. 6, 23 L. Ed. 2d 57.

REASONS FOR GRANTING THE WRIT.

I.

A SECOND SEARCH CANNOT BE A BORDER SEARCH, UNREGULATED BY THE CONSTITUTIONAL REQUIREMENTS OF THE FOURTH AMENDMENT.

The Court of Appeals did not justify the warrantless seizure of defendant's suitcase upon a finding of probable cause but on the theory that the seizure was justified as under the concept of "Border Searches", citing *United States* v. *Morales*, 378 F. 2d 187 (5 Cir.)* The issue before this court is whether the concept of "Border Searches" permits the search and seizure upon suspicion only some 20 hours after defendant had been thoroughly searched at the border, no contraband found, and defendant permitted to proceed on his way.

In the instant case, defendant crossed the border some 20 hours prior to the seizure. At that time, his automobile was thoroughly searched (T. 22). No contraband was found. Any right to conduct a warrantless seizure, absent probable cause, based upon the inherent right to search those entering at a border, dissipated upon the search and finding no contraband. In *Carroll* v. *United States*, 267 U.S. 132, 154, 45 S. Ct. 280, 285, 69 L. Ed. 543 (1925), this court said:

> "Travelers may be * * * stopped in crossing an international boundary, because of national self-protection reasonably requiring one entering the coun-

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* The suitcase was seized prior to the agent smelling any marijuana. He testified "I picked the bag up and smelled along the opening and I smelled what to me was marijuana" (T. 29).

> try to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official, authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise."

In *United States* v. *Selby,* 407 F. 2d 241, Ninth Circuit, the court held that a "second search" cannot be a border search. To hold otherwise would permit agents, after failing to discover contraband at a border search, to arrest, seize and search whenever it was their inclination. This would be contrary to the constitutional requirement that search and seizure must be based on solid facts and not be at the mere whim of government officers. *Henry* v. *United States,* 361 U.S. 98. *Beck* v. *Ohio,* 379 U.S. 89. *Chimel* v. *California,* 23 L. Ed. 685, *Shipley* v. *California,* 23 L. Ed. 2d 732.

The ruling by the Fifth Circuit in the case at bar is in direct conflict with the Ninth Circuit's holding in *Selby.*

Certiorari should be granted for it is of national importance whether the concept of "Border Searches" can extend to otherwise unconstitutional intrusions of citizen's rights where there has been a thorough border search of a fruitless nature.

II.

THE SEIZURE 20 HOURS AFTER DEFENDANT CROSSED BORDER AND WAS SEARCHED, NO CONTRABAND FOUND, ABSENT A WARRANT, VIOLATED THE FOURTH AMENDMENT OF THE CONSTITUTION.

The Court of Appeals in affirming the warrantless seizure, relied on *Romero* v. *United States,* 5 Cir., 319 F. 2d 530. In *Romero,* the court relied upon this court's now overruled opinion in *United States* v. *Rabinowitz,* 339 U.S. 56, 94 L. Ed. 653. This court in a recent line of cases, *Terry* v. *Ohio,* 392 U.S. 1, 20 L. Ed. 2d 889, *Sibron* v. *New York,* 392 U.S. 40, 20L. Ed. 2d 917, *Chimel* v. *California,* 23 L. Ed. 2d 688, *VonCleef* v. *New Jersey,* 23 L. 2d. 2d 728, *Shipley* v. *California,* 23 L. Ed. 2d 732, has held that except in "emergency situations" a search or seizure absent a warrant is unconstitutional. The warrant requirement of the Fourth Amendment, must apply to seizure by customs agents, not incident to a border crossing.

The requirement that law enforcement officers must submit the basis for making a seizure to a neutral judicial officer, logically must apply to customs agents making seizure some 20 hours after a person has entered the country, where this person and his vehicle were thoroughly searched upon entry of the United States. The seizure is clearly not a search at border crossing. Custom Agents conducting searches cannot violate the constitution merely because they are pursuing their duty to prevent the illegal importation of goods. *Corngold* v. *United States,* 367 F. 2d 1 (9 Cir.), *United States* v. *VanLeeuwen,* 414 F. 2d 758 (9 Cir.). To hold otherwise would be to permit indiscriminate arrest, searches and seizures of persons lawfully within the United States

based merely upon the suspicion of the Custom Agents. The interest of the United States of America, is far better served by requiring search and seizure under these conditions, to be upon a warrant issued by a neutral magistrate. *Sibron* v. *New York,* supra, *Chimel* v. *California,* supra, *VonCleff* v. *California,* supra, *Shipley* v. *California,* supra. In *Corngold* v. *United States,* supra, under facts similar to the case at bar, the court said:

> "The officers had no warrant, and there were no circumstances which might have justified a search without one. No arrest was made to which a search without a warrant might be incident. The government made no showing that the packages might be removed before a warrant could be obtained. Appellant was not threatening to remove them, nor was the airline, except under such conditions as the officers saw fit to impose. From the time appellant left the packages with the carrier in Los Angeles they were subject to the effective control of the customs agents. There was nothing to prevent the agents from securing a warrant on a proper showing, either before the packages were shipped from Los Angeles or after they arrived in New York. On this record, search without a warrant was not justified even if the customs agents had probable cause to believe the packages contained contraband."

In *United States* v. *VanLeeuwen,* 414 F. 2d 758 (9 Cir.), the court held that detention of first class mail packages for 29 hours *without warrant* authorizing detention was an unconstitutional seizure, even though customs officers knew that the addressee of a package was suspected of trafficking in gold coins and therefore the agent had probable cause to seize package. The court asserted the position that prior to a seizure, there must be a determination by a neutral judicial officer.

In the instant case, the Government offered no evidence that the package might be removed before a warrant could be obtained, the appellant was not threatening to remove the article, and the airline, except under such conditions as the officers so saw fit to impose, was not threatening to remove such packages. From the time that the Customs agent walked into the air terminal in Laredo, Texas, the bag which was subsequently searched, was under the effective control of the Customs agent. There was nothing to prevent the agent from securing a warrant on a proper showing, either before the suitcase was shipped from Laredo, or after it had arrived in Chicago. The agent knew the appellant's identity, had been maintaining a close surveillance of the defendant for the past three or four days immediately prior to the seizure, and was certainly without reason to believe that the other Customs agents assisting him in maintaining such surveillance would not continue to keep the appellant under surveillance until a search warrant could be obtained, and a proper search conducted.

The decision of the court in the instant case in that it permits a seizure absent a warrant is in direct conflict with the opinion of the Ninth Circuit, *Corngold* v. *United States,* 367 F. 2d 1, and *VanLeeuwen,* 414 F. 2d 758 and in apparent conflict with those decisions of this court holding that search and seizure can be made only upon the determination of a neutral judicial officer. *Sibron* v. *New York,* supra, *Chimel* v. *California,* supra, *VonCleff* v. *California,* supra, *Shipley* v. *California,* supra.

Certiorari should be granted for it is of national importance whether custom agents can indiscriminately search and seize many hours after person has passed

through a border station, been thoroughly searched and nothing found, without prior authorization of a neutral judicial officer.

III.

COUNT I, REQUIRING DEFENDANT TO INVOICE MARIJUANA PURSUANT TO TITLE 21, SECTION 176(a) IS CONSTITUTIONALLY INVALID; IT VIOLATED DEFENDANT'S FIFTH AMENDMENT RIGHT NOT TO INCRIMINATE HIMSELF.

Count I of the indictment asserted that defendant did "unlawfully, knowingly and wilfully, with intent to defraud the United States, smuggle and clandestinely introduce into the United States, a quantity of marijuana which should have been invoiced, to-wit: approximately Ten (10) pounds of marijuana (cannabis sativa) without having such marijuana invoiced, contrary to and in violation of 176(a) Title 21, U.S.C." Section 176(a) as applied in the above count is constitutionally invalid, being in violation of a citizen's right not to incriminate himself.

To sustain a conviction under Count I, there must be proof that defendant failed to "invoice" the marijuana that he had brought into the United States. Requiring a person to invoice marijuana he brings into the United States, violates his right not to incriminate himself. If he did invoice said marijuana, there could be no conviction of bringing such marijuana into the United States. However, the fact that he possessed marijuana and desired to bring it into the United States is a fact which could be used against him in prosecutions for prior involvement in other narcotic transactions, especially any indictment involving a general conspiracy to possess or

sell or import or conceal narcotics. The testimony of the agent indicates that defendant may have been involved in other narcotic transactions or a conspiracy with others who were involved in other narcotic transactions. He may have been subject to prosecution under laws of the United States and of the fifty states. The self-incrimination provision of the Fifth Amendment extends to protect a person from giving statements which may incriminate him relative to any illegal activity, even though the act described in his statement is not itself criminally punishable. A person can invoke his Fifth Amendment privilege when the admission would furnish a link in the chain of evidence needed in a prosecution. *Balu* v. *United States,* 340 U.S. 159, 95 L. Ed. 2d 170. The "invoice" requirement is therefore constitutionally invalid. *Leary* v. *United States,* 395 U.S. 6, 23 L. Ed. 2d 57, *Marchetti* v. *United States,* 385 U.S. 1600, 19 L. Ed. 2d 889, *Grosso* v. *United States,* 385 U.S. 10, 19 L. Ed. 2d 906, *Haynes* v. *United States,* 385 U.S. 931, 19 L. Ed. 2d 923. The conviction on Count I is therefore constitutionally invalid.

IV.

THE CONVICTION UNDER COUNT II, WHICH RELIES ON THE PRESUMPTIVE FEATURES OF TITLE 21, SECTION 176(a) IS CONSTITUTIONALLY INVALID.

Count II alleged that defendant "with intent to defraud the United States, did unlawfully, and knowingly transport and facilitate the transportation and concealment of approximately Ten (10) pounds of marijuana (cannabis sativa), more or less, after importation and the defendant then and there knew said marijuana to have been imported into the United States." In order to sustain a conviction on this count, it was essential to

prove (1) that the marijuana was imported into the United States and (2) that defendant knew that said marijuana was imported into the United States. *Leary* v. *United States,* 395 U.S. 6, 23 L. Ed. 2d 57. There is no evidence to support a finding on either of these essential elements. The sole evidence was the testimony given on the hearing to suppress the marijuana. It was undisputed that when defendant returned from Mexico, his car was thoroughly searched and no contraband was found. This raises a reasonable doubt as to whether the marijuana was imported into the United States by defendant and if imported, defendant knew of said importation.

The only evidence suggesting that the marijuana seized was imported was (1) the tip from the informer that people were trying to import marijuana, (2) defendant being seen in Mexico with person "known" to deal in narcotics and (3) defendant visited areas within the United States which were allegedly used as a place for illegal importation of marijuana. Such facts would not even be sufficient to raise to reasonable cause, to-wit: (1) *Agular* v. *Texas,* 378 U.S. 108, a tip from an alleged reliable informer is insufficient for probable cause, absent a showing of the facts underlying both the reliability of the informer and the source of informer's information, (2) *Sibron* v. *New York,* 392 U.S. 41 conversation and association with known narcotic users, absent knowledge as to the content of the conversation is unsufficient to justify an arrest, search or seizure, (3) *Spinelli* v. *United States,* 89 S. Ct. 584, corroboration of innocuous details which are innocent by themselves "are not endowed with an aura of suspicion by virtue of an informer's tip" and do not raise to probable cause. The evidence was there-

fore clearly insufficient to prove that the marijuana was imported, as distinct from a domestic variety and if imported, that defendant knew of such importation.

The only basis for a conviction upon Count II was the presumptive aspects of Title 21, 176(a) making mere possession sufficient to prove both importation and knowledge of importation. This provision had been constantly held valid in numerous decisions in the court of Appeals at the time of defendant's trial in April, 1969. No doubt, the trial court convicted petitioner, absent any actual evidence of importation or knowledge of importation by applying the presumptive provision.

Petitioner need not demonstrate conclusively that the trial court relied upon the presumptive provisions of Title 21, Section 176(a). Where there is a general verdict, and it is impossible to determine whether the verdict was based on unconstitutional provisions, the conviction must be reversed. *Sheet* v. *New York,* 22 L. Ed 2d 572, *Shomberg* v. *California,* 283 U.S. 359, 75 L. Ed. 1117, *Williams* v. *North Carolina,* 317 U.S. 287, 87 L. Ed. 279.

Subsequent to defendant's trial, the presumptive provision of Title 21, Section 176(a) was held to be unconstitutional. *Leary* v. *United States,* 395 U.S. 6, 23 L. Ed. 2d 57. His conviction under Count II, based on such provision, is constitutionally invalid.

V.

DEFENDANT'S CONVICTION BASED UPON THE FAILURE OF DEFENDANT TO PAY A TRANSFER TAX, PURSUANT TO TITLE 21, SECTION 176(a) IS UNCONSTITUTIONALLY VOID.

Count III charged defendant with having failed to pay a transfer tax pursuant to Title 26, Section 4744(a)(2).

This section was held to be constitutionally invalid in *Leary* v. *United States,* 395 U.S. 6, 23 L. Ed. 57. Defendant's conviction of this count is therefore constitutionally void.

VI.

THE CLAIM OF THE UNCONSTITUTIONALITY OF SECTION 176(a), TITLE 21, U. S. CODE, AS APPLIED TO DEFENDANT IN COUNT I AND COUNT II AND THE UNCONSTITUTIONALITY OF TITLE 26, SECTION 4744(a)(2), AS APPLIED TO DEFENDANT BY COUNT III WAS NOT WAIVED.

Defendant was tried prior to the court's decision in *Leary* v. *United States,* 395 U.S. 6, 23 L. Ed. 2d 57. The unconstitutionality of his conviction was not therefore waived.

In *O'Connor* v. *Ohio,* 385 U.S. 92, petitioner's prior request for certiorari had been denied, 382 U.S. 19. Subsequently, the court rendered its decision in *Griffin* v. *California,* 380 U.S. 609. Petitioner raised for the first time in his petition for rehearing, that his rights had been violated in that the prosecutor had commented upon defendant's failure to testify. (382 U.S. 337) This issue had not been raised either at trial or in the state reviewing courts. This Court held that such issue could be raised for the first time in a petition for rehearing on the petition for certiorari and stated:

> "The state does not contest the fact that the prosecutor's remarks violated the constitutional rule announced in *Griffin.* Moreover, it is clear the prospective application of that rule, announced in *Tehan* v. *U.S. ex rel. Shott,* 382 U.S. 406, 86 S. Ct. 459, 15 L. Ed. 2d 453, does not prevent petitioner from relying on *Griffin,* since his conviction was not final when

the decision in *Griffin* was rendered. Indeed, in *Tehan* we cited our remand of petitioner's case as evidence that *Griffin* applied to all convictions which had not become final on the date of the *Griffin* judgment. 382 U.S., at 409, n. 3, 86 S. Ct., at 461. Thus, the only issue now before us is the permissibility of invoking the Ohio procedural rule to defeat petitioner's meritorious federal claim."

"We hold that in these circumstances the failure to object in the state courts cannot bar the petitioner from asserting this federal right. Recognition of the States' reliance on former decisions of this Court which *Griffin* overruled was one of the principal grounds for the prospective application of the rule of that case. See *Tehan* v. *U. S. ex rel. Shott,* 382 U.S. 406, 417, 86 S. Ct. 459, 465, 15 L. Ed. 2d 453. Defendants can no more be charged with anticipating the *Griffin* decision than can the States. Petitioner had exhausted his appeals in the Ohio courts and was seeking direct review here when *Griffin* was handed down. Thus, his failure to object to a practice which Ohio had long allowed cannot strip him of his right to attack the practice following its invalidation by this Court." 385 U.S. 93.

In *Curtis* v. *Butts,* 388 U.S. 130, the court also held that a constitutional right not raised at trial can be raised on appeal where it is clear that there was no knowing waiver of such right, and there had been a recent change of the law, due to decisions of the United States Supreme Court.

In *Grosso* v. *United States,* 390 U.S. 62, the Court considered the invalidity of the statute, although such issue was not raised in the trial court. There, this Court stated:

"Petitioner has not, however, asserted a claim of privilege either as to the counts which charged willful failure to pay the occupational tax, or as to the

allegation that he conspired to evade payment of the occupational tax. Given the decisions of this court in *Kahriger* and *Lewis,* supra, which were on the books at the time of petitioner's trial, and left untouched by *Albertson* v. *SACB,* supra, we are unable to view his failure to present this issue as an effective waiver of the constitutional privilege."

"Since the record is barren of any evidence on which a finding of waiver of the privilege against self-incrimination might properly be predicted, and since, absent such a waiver, reversal of the conviction would be inevitable in light of our holdings today in this case and in *Marchetti,* we consider that the entire case should now be finally disposed of at this level. In the special circumstances presented, this course seems to us to be dictated by considerations of sound judicial administration, in order to obviate further and entirely unnecessary proceedings below."

Several circuits have held that the constitutional issue respecting the Federal Wagering Tax Act could be raised on appeal, even where the issue was not raised at trial. See *Caglione* v. *United States,* 5 Cir., 396 F. 2d 219; *Greenwood* v. *United States,* 4 Cir., 392 F. 2d 558; *United States* v. *Manfredonia,* 2 Cir., 391 F. 2d 229; *Harris* v. *United States,* 8 Cir., 390 F. 2d 617.

Errors of this nature involving the constitutional invalidity of the statutory provisions upon which a conviction is based, raises itself to plain error, which can be considered even if not raised in the lower Courts. *Silber* v. *United States,* 370 U.S. 717, *United Brotherhood* v. *United States,* 330 U.S. 395, *United States* v. *Atkinson,* 279 U.S. 157. This is especially true when the constitutional right relied upon by petitioner was re-evaluated after his trial.

It is consistent with the judicial philosophy of this Court, to consider the invalidity of defendant's conviction, based on the violation of defendant's Fifth Amendment rights, where there is no showing of purposeful and knowledgable waiver.

CONCLUSION.

We respectfully submit the matters here presented are of general import to the supervision of criminal trials throughout the states.

We pray that your Honors will consider this a fit case to warrant this Court's attention and granting of the writ.

Respectfully submitted,

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APPENDIX A

In The
UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 28090
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

PAUL BARSALOUX,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

(December 8, 1969)

Before *Bell, Ainsworth, and Godbold,* Circuit Judges.

Per Curiam: Pursuant to Rule 18 of the Rules of this court, we have concluded on the merits that this case is of such character as not to justify oral argument and have directed the clerk to place the case on the Summary Calendar and to notify the parties in writing. See *Murphy* v. *Houma Well Service,* 5 Cir., 1969, 409 F. 2d 804, Part I; and *Huth* v. *Southern Pacific*

Company, 5 Cir., 1969, ... F. 2d ....., Part I [No. 27439, October 7, 1969].

Appellant Barsaloux was charged in a three count indictment with one, smuggling marihuana into the United States in violation of 21 USCA § 176a; two, transporting illegally imported marihuana in violation of 21 USCA, § 176a; and three, transporting marihuana without having paid the transfer tax in violation of 26 USCA, § 4744(a) (2). On April 18, 1969, he was convicted on all three counts. On June 19, 1969, he received six year sentences on each count to be served concurrently. This appeal followed and we affirm.

The sole assignment of error presented is that the marihuana which formed the basis of the conviction was obtained in an illegal search and seizure. This contention is without merit. The search and seizure in question was of a suitcase containing ten pounds of marihuana. It was the result of an investigation and sustained surveillance near the international border by Customs Agents. The record discloses that they had sufficient reason to believe that appellant was engaged in an effort to smuggle marihuana or narcotics into the United States.

Such border searches, under the statutory authority of 19 USCA, § 482, have long been measured by different criteria than ordinary searches. *Morales* v. *United States,* 5 Cir., 1967, 378 F. 2d 187.

Appellant delivered the suitcase to the Trans Texas Airlines Terminal in Laredo, Texas for delivery to Chicago. This delivery was witnessed by a Customs Agent. Upon viewing the suitcase, he detected the odor of

marihuana coming from the suitcase. The facts give rise to the inference that the suitcase might have been retrieved at the time by appellant or his associates. Such a search and the subsequent seizure without a warrant is constitutionally permissible. See *Romero* v. *United States,* 5 Cir., 1963, 318 F. 2d 530. This ends the matter of the search and seizure.

In passing, we note that the concurrent sentence on count three of the indictment is imposed for violation of the statute which was held to have violated the defendant's right against self-incrimination in *Leary* v. *United States,* 1969, 395 U.S. 6, 89 S. Ct. 1532, 23 L. Ed. 2d 57. We pretermit discussion of any Fifth Amendment question regarding this count since no such question was raised in the district court nor has any such question been asserted here. Assuming *arguendo* its facial invalidity under *Leary,* there would still remain an issue as to waiver. We rely on the concurrent sentence doctrine of *Hirabayashi* v. *United States,* 1943, 320 U.S. 81, 63 S. Ct. 1375, 87 L. Ed. 1774, in pretermitting consideration of count three. This doctrine which rests on judicial convenience is viable under *Benton* v. *Maryland,* 1969, ... U.S. ....., 89 S. Ct. ....., 23 L. Ed. 707. Cf. *United States* v. *Laite,* 5 Cir., 1969, ... F. 2d ..... [No. 26,342, slip opinion dated October 13, 1969]. There is no constitutional infirmity in the statute involved in counts one and two and absent a showing of some specific detriment accruing under the concurrent sentence on count three, no good purpose would be served by reaching the *Leary* question.

Affirmed.

APPENDIX B

STATUTES INVOLVED

§ 176a. Smuggling of marihuana; penalties; evidence; definition of marihuana

Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned for not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

§ 4744. Unlawful possession

(a) *Persons in general.*—It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741(a)—

(1) to acquire or otherwise obtain any marihuana without having paid such tax, or

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(2) to transport or conceal, or in any manner facilitate the transportation or concealment of, any marihuana so acquired or obtained.

Proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the Secretary or his delegate, to produce the order form required by section 4742 to be retained by him shall be presumptive evidence of guilt under this subsection and of liability for the tax imposed by section 4741(a).

(b) *Government and state officials.*—No liability shall be imposed by virtue of this section upon any duly authorized officer of the Treasury Department engaged in the enforcement of this part, or upon any duly authorized officer of any State, or Territory, or of any political subdivision thereof, or the District of Columbia, or of any insular possession of the United States, who shall be engaged in the enforcement of any law or municipal ordinance dealing with the production, sale, prescribing, dispensing, dealing in, or distributing of marihuana. Aug. 16, 1954, c. 736, 68A Stat. 562; July 18, 1956, c. 629, Title I, § 101, 70 Stat. 567.